Supreme Court, U.S.
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In the Supreme Court of the United States

VIRGINIA ANDERSON,

Petitioner,

v.

WESTINGHOUSE SAVANNAH RIVER COMPANY, LLP; BECHTEL SAVANNAH RIVER, INC.; THE BABCOCK & WILCOX SAVANNAH RIVER COMPANY, INC.; and BRITISH NUCLEAR FUELS LTD. SAVANNAH RIVER CORP.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a disparate impact plaintiff under Title VII, who has shown admissible statistical evidence of adverse impact, must, as the Fourth Circuit held in this case, also establish that the employer intended to discriminate, even though this Court held in *Griggs v. Duke Power Co.* that such a showing is not required?

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PETITION FOR A WRIT OF CERTIORARI

Anderson respectfully petitions this Court for a writ of *certiorari* to review a judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit, affirming summary judgment for defendants-respondents Westinghouse Savannah River Company ("WSRC"); Bechtel Savannah River, Inc; The Babcock & Wilcox Savannah River Company; and British Nuclear Fuels Ltd., Savannah River Corp. (collectively "respondents"), is reported as *Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248 (4th Cir. 2005) and is attached to the Appendix at App. 1. In a 7 to 5 decision the Fourth Circuit denied rehearing en banc, reported as *Anderson v. Westinghouse Savannah River Co.*, 418 F.3d 393 (4th Cir. 2005), attached to the Appendix at App. 90. The District Court's unreported order granting summary judgment is attached to the Appendix at App. 68.

STATEMENT OF JURISDICTION

The judgment of the Fourth Circuit en banc denying rehearing was entered August 9, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-*et seq*. The relevant portion of Title VII provides:

> 1(A) An unlawful employment practice based on disparate impact is established under this subchapter only if –
>
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race . . . and the respondent fails to demonstrate that the challenged practice is job-related for the position in question and consistent with business necessity; or
>
> (ii) the complaining party makes the demonstration described . . . with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

42 U.S.C. § 2000e-2k(1)(A)(i), (ii).

STATEMENT OF THE CASE

In 1997, twelve African-American employees filed a class action lawsuit against respondents, the four employers at the Savannah River nuclear waste processing site (the "Site"), alleging race discrimination in violation of Title VII and jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(4) and 42 U.S.C. § 2000e-5(f)(3). (App. 15) In 1999, petitioner Anderson and eighty-six other African-American employees were added as plaintiffs. *Id.* The

class representatives claimed that respondents maintained a pattern and practice of discrimination against African-Americans and used employment practices that had a racially disparate impact. *Id.* The District Court denied class certification and directed each named plaintiff to proceed individually. (App. 16) Anderson filed a Fourth Amended Complaint, asserting only individual claims. *Id.*

Anderson has been employed by WSRC since 1978 and, in significant respects, typifies the individual African-Americans described in the putative class definition. (App. 5) She alleges that she was denied promotions due to her race and that respondents' Competency Based Posting System ("CBPS") for promotions had a racially disparate impact on her and other African-Americans. (App. 6)

The CBPS is a three-step job posting system first implemented in mid-1997, through which most exempt job openings must be filled. (App. 6-7) First, applicants submit a resume or personal history form and performance appraisals. The Human Resources division ("HR") screens applicants for a position's minimum qualifications. (App. 8) HR forwards to the hiring manager the applicants' documents with a list of qualified applicants on a form that provides, *inter alia*, the race of the applicants.

Second, the hiring manager and a panel of two or more managers chosen by the hiring manager select some of the qualified applicants for interview by scoring their resumes against weighted CBPS job criteria, consisting of general "core competencies" and specific "functional competencies." (App. 10) Third, the hiring manager and panel interview the selected applicants and score their responses to highly subjective questions about the competencies. *Id.*

The hiring manager makes the final selection on subjective grounds. Thus, the CBPS is inherently subject to the discretion of mostly white managers.

The CBPS has had a statistically significant adverse impact on African-American employees, including Anderson. (App. 29-30) The class representatives' expert found a statistically significant under-representation of, and adverse effect on, African-American employees at the second and third CBPS stages. *Id.* Overall differences from the expected number of selections were equivalent to -4.51 standard deviations; for the individual steps, from -2.38 to -6.64 standard deviations.[1] Anderson, like many other African-American employees, was repeatedly rejected for promotion under this system.

In or about December 1997, WSRC posted an opening for an Administrative Assistant position with the following minimum qualifications:

> [h]igh school diploma and 8-12 years practical experience in a business or administrative area or Associate Degree in a nontechnical or business discipline with at least 4-7 years practical experience in business or administrative area or BS/BA in a nontechnical or business discipline and at least 1-3 years of practical experience in business, administrative, budgeting or program planning.

The posting also stated that the required core competencies for the position were "customer focus," "flexibility," "problem solving" and "professional."

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[1] These statistics were admitted into evidence.